

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5
6 SEARS HOLDINGS CORPORATION, Case No. 18-23538-rdd

7
8 Debtor.

9 - - - - - x

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12 U.S. Bankruptcy Court
13 300 Quarropas Street
14 White Plains, New York 10601

15
16 October 23, 2019
17 10:19 AM
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21 B E F O R E :
22 HON ROBERT D. DRAIN
23 U.S. BANKRUPTCY JUDGE
24

25 ECRO: A. VARGAS

1 Notice of Agenda of Matters Scheduled for Hearing on October
2 23, 2019 at 10:00 a.m.

3

4 Notice of Assumption and Assignment of Additional
5 Designatable Leases (ECF 3298)

6

7 Second Interim Fee Application of Deloitte & Touche LLP for
8 Compensation for Services Rendered and Reimbursement of
9 Expenses Incurred as Independent Auditor and Advisor from
10 March 1, 2018 through June 30, 2019, fee \$91,365.50,
11 expenses: \$0.00 (ECF 4826)

12

13 Joinder by Pearl Global Industries Ltd (ECF 4990)

14

15 Joinder Omnibus Objection of Cherokee Debt Acquisition, LLC,
16 Hain Capital Investors Master Fund Ltd., Whitebox Asymmetric
17 Partners LP, Whitebox Multi-Strategy Partners, L.P. (ECF
18 5012)

19

20 A.O. Smith Corporation's Joinder to Priority Claimant
21 Consortium Joinder, Omnibus Objection to Fee Applications
22 (ECF 5044)

23

24 Limited Objection of Mien Co. Ltd. (ECF 5159)

25

1 Second Interim Fee Application of Deloitte Transactions and
2 Business Analytics LLP for Compensation for Services
3 Rendered and Reimbursement of Expenses Incurred as
4 Bankruptcy Advisor from March 1, 2019 through June 30, 2019
5 fee: \$2,177,270.75, expenses: \$100,390.95 (ECF 4827)

6
7 Second Application of Alvarez and Marsal North America, LLC
8 as Financial Advisors for the Debtors, for Interim Allowance
9 of Compensation of Professional Services Rendered and
10 Reimbursement of Actual and Necessary Expenses Incurred from
11 March 1, 2019 through June 30, 2019 (ECF 4828)

12
13 Second Interim Fee Application of Paul, Weiss, Rifkind,
14 Wharton & Garrison LLP, Attorneys for the Debtors and
15 Debtors In Possession, for the period from March 1, 2019
16 through and including June 30, 2019 (ECF 4834)

17
18 Second Interim Fee Application of Staut Risius Ross, LLC,
19 Real Estate Consultant and Advisor for the Debtors for the
20 period from March 1, 2019 through and including June 30,
21 2019 (ECF 4835)

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23
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25

1 Second Interim Fee Application of Evercore Group, L.L.C. for
2 Allowance of an Administrative Claim for Compensation of
3 Services Rendered and Reimbursement of Expenses Incurred as
4 Investment Banker to the debtors for the period from March
5 15, 2019 through and including July 14, 2019 (ECF 4837)

6
7 Second Interim Fee Application of Prime Clerk LLC, as
8 Administrative Agent to the Debtors for Services Rendered
9 and Reimbursement of Expenses for the period from March 1,
10 2019 through and including June 30, 2019 (ECF 4840)

11
12 Second Interim Fee Application of FTI Consulting, Inc.,
13 Financial Advisor to the Official Committee of Unsecured
14 Creditors of Sears Holdings Corporation, et al. for Interim
15 Allowance of Compensation and Reimbursement of Expenses for
16 the period from March 1, 2019 through and including June 30,
17 2019 (ECF 4841)

18
19 Second Interim Fee Application of Houlihan Lokey Capital,
20 Inc. Investment Banker to the Official Committee of
21 Unsecured Creditors, for Interim Allowance of Compensation
22 and Reimbursement of Expenses for the period from March 1,
23 2019 through and including June 30, 2019 (ECF 4842)

24
25

1 First Joint Application of Paul E. Harner, as Fee Examiner
2 and Ballard Spahr LLP. as Counsel to the Fee Examiner for
3 Interim Allowance of Compensation for Professional Services
4 Rendered and Reimbursement of Expenses from April 22, 2019
5 through June 30, 2019 (ECF 4844)

6
7 Second Interim Fee Application of Akin Gump Strauss Hauer &
8 Feld LLP as Counsel to the Official Committee of Unsecured
9 Creditors for Allowance of Compensation and Reimbursement of
10 Expenses for the period from March 1, 2019 through and
11 including June 30, 2019 (ECF 4846)

12
13 Second Interim Fee Application of Deloitte Tax LLP for
14 Compensation and Reimbursement of Expenses for the period
15 from March 1, 2019 through and including June 30, 2019 (ECF
16 4848)

17
18 Second Application of Weil, Gotshal & Manges LLP, as
19 Attorneys for the Debtors, for Interim Allowance of
20 Compensation and Reimbursement of Expenses for the period
21 from March 1, 2019 through and including June 30, 2019 (ECF
22 4860)

1 Second Interim Fee Application of Young, Conaway, Stargatt &
2 Taylor, LLP, as Conflicts Counsel for the Debtors for the
3 period from March 1, 2019 through and including June 30,
4 2019 (ECF 4862)

5
6 First Application for Interim Professional Compensation for
7 Elise S. Frejka, Ombudsman Consumer, period: 12/3/2018 to
8 7/31/2019, fee: \$108,386.25, expenses: \$663.26 (ECF 4910)

9
10 Motion of Brian Coke Ng for Relief from the Automatic Stay
11 (ECF 5230)

12
13 Debtors' Objection (ECF 5388)

14
15 Movant's Reply Brief/Affidavit in Support of Motion (ECF
16 5469)

17
18 Adversary proceeding: 19-08269-rdd Ng v Sears Holding
19 Corporation et al PDX, Inc.'s Motion to Dismiss Adversary
20 Complaint (ECF 5)

21
22 Debtors' Motion to Dismiss Adversary Complaint (ECF 7)

23
24 Declaration of Jessie B. Nishkin in Support of Debtors'
25 Motion to Dismiss Adversary Complaint (ECF 8)

1 Oleg Bitman Notice of Debtors' Motion to Dismiss Adversary
2 Complaint and Declaration of Jessie B. Ishkin in Support of
3 Debtors' Motion to Dismiss Adversary Complaint (ECF)

4

5 Opposition of Brian Coke Ng to PDX, Inc.'s Motion (ECF 10)

6

7 Adversary Proceeding: 19-08269-rdd Ng v Sears Holding
8 Corporation et al Motion to Strike the Affidavit of Service
9 by Oleg Bitman (related document(s)9)

10

11 Adversary Proceeding: 19-08269-rdd Ng v Sears Holding
12 Corporation et al Motion to Strike the Declaration of Jessie
13 B. Mishkin (related document(s)8)

14

15 Adversary Proceeding: 19-08269-rdd Ng v Sears Holding
16 Corporation et al Plaintiff's Affidavit in Support of
17 Application and Request for Certificate of Default (ECF 15)

18

19 Motion of Brian Coke Ng for Default Judgment (ECF 16)

20

21 Plaintiff's Affidavit in Support of Entry of Default
22 Judgment and Damages (ECF 24)

23

24

25 Transcribed by: Sherri L. Breach

1 A P P E A R A N C E S :

2 WEIL GOTSHAL & MANGES

3 Attorneys for Debtors

4

5 BY: GARRETT FAIL, ESQ.

6 OLGA PESHKO, ESQ.

7 JENNIFER CROZIER, ESQ.

8

9 CLEARY GOTTlieb STEEN & HAMILTON

10 Attorneys for Transform Holdco & affiliates

11

12 BY LUKE BAREFOOT, ESQ.

13

14 AKIN, GUMP, STRAUSS, HAUER & FELD, LLP

15 Attorneys for Official Committee of Unsecured Creditors

16

17 BY: PHIL DUBLIN, ESQ.

18

19 KIRBY AISNER & CURLEY, LLP

20 Attorneys for PDX Inc. & National Health Information

21

22 BY: JULIE CVEK CURLEY, ESQ.

23

24

25

1 P R O C E E D I N G S

2 THE COURT: Okay. Good morning. In re: Sears
3 Holdings Corp., et al.

4 MR. FAIL: Good morning, Your Honor. For the
5 record, Garrett Fail, Weil Gotshal and Manges for the
6 debtors. Thank you and your chambers for the time this
7 morning. And the agenda has been reduced from -- on the
8 calendar that was previously scheduled.

9 The first matter on the agenda is an uncontested
10 matter related to a notice of assumption and assignment of a
11 designatable lease.

12 For this matter I propose to turn over the podium
13 to Mr. Barefoot from Cleary to walk the Court through.

14 THE COURT: Okay.

15 MR. FAIL: Thank you, Your Honor.

16 MR. BAREFOOT: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. BAREFOOT: For the record, Luke Barefoot from
19 Cleary Gottlieb Steen & Hamilton, LLP for Transform Holdco
20 and its affiliates.

21 Your Honor, Agenda Item Number 1 addresses the
22 assumption and assignment of a lease with Starboard Platform
23 Brighton Jv LLC that governs a distribution center located
24 in Brighton, Colorado. This has been on and off the agenda
25 for some time. The main issue that it's --

1 THE COURT: This is the roof, right?

2 MR. BAREFOOT: Correct. Correct, Your Honor.

3 THE COURT: The \$10 million roof?

4 MR. BAREFOOT: The main issue that has held us up
5 was the issue of non-monetary defaults related to some
6 structural repairs that the landlord alleged were required
7 to be completed to the roof as a condition to assumption and
8 assignment.

9 I am pleased to report that the parties have
10 negotiated a comprehensive amendment to the lease that
11 addresses a time frame and a construction agreement to
12 complete an agreed upon scope of repairs and that removes
13 any roadblock to assumption and assignment.

14 THE COURT: Okay.

15 MR. BAREFOOT: We have an agreed upon form of
16 order that reflects minor modifications to the form of order
17 we have typically been using for lease assignments mainly to
18 address the amendment to the lease and the obligations that
19 are related to that.

20 I'm happy to hand that up or simply submit it to
21 chambers --

22 THE COURT: You can --

23 MR. BAREFOOT: -- following the hearing.

24 THE COURT: You can email it to chambers. As long
25 as the parties have agreed on the parameters of dealing with

1 the roof which is the issue that was before the Court, I am
2 satisfied. So you can email that to chambers.

3 MR. BAREFOOT: Very good, Your Honor. And with
4 that just as a -- in the nature of a status update, with
5 this we are now literally down to two outstanding leases for
6 assumption and assignment. There has been a stipulation
7 submitted where those have been set down for a hearing, a
8 non-omnibus hearing on November 21st.

9 THE COURT: Okay. Is that going to be an
10 evidentiary hearing?

11 MR. BAREFOOT: Your Honor, the parties -- our
12 colleagues at DLA Piper actually are handling those two and
13 the parties are still in discussions I think with the hope
14 of avoiding an evidentiary hearing. But if it goes forward
15 it would be an evidentiary hearing.

16 THE COURT: Okay. Well, can you just convey to
17 them and they should convey to the other side, too, that if
18 the parties do intend to produce evidence, they should --
19 let me back up. If they agree on the documentary evidence,
20 there's no problem. If they intend to have witnesses, they
21 should follow my normal practice of having witness
22 declarations provided to chambers a week in advance and an
23 agreed exhibit book with the witnesses there for cross.

24 MR. BAREFOOT: Understood, Your Honor. We hear
25 you loud and clear on that.

1 THE COURT: Okay. And --

2 MR. BAREFOOT: Thank you.

3 THE COURT: -- I think they understand that
4 because that's how they've handled the relatively small
5 number of prior evidentiary hearings on these issues. But
6 if you would just communicate that to them I would
7 appreciate it.

8 MR. BAREFOOT: Very good, Your Honor. Thank you.

9 THE COURT: Okay.

10 MR. FAIL: Your Honor, the next item on the agenda
11 fall under the category of fee matters. There are 15
12 interim fee applications that are on for hearing today going
13 forward on a uncontested basis. We have circulated a
14 proposed form of order which takes care of 14 of the
15 applications, and the application for the privacy ombudsman
16 was submitted with a separate order which will -- which
17 would approve the fees for that application.

18 If Your Honor would permit, I can hand up a copy
19 now and we would obviously provide an electronic copy to
20 chambers, if it would be helpful I can --

21 THE COURT: Okay.

22 MR. FAIL: -- submit it.

23 THE COURT: Why don't you do that?

24 (Pause)

25 THE COURT: Thanks.

1 MR. FAIL: Your Honor, I'm happy to answer any
2 questions. I don't want to prolong the hearing. There were
3 -- there was one objection filed for the record by the mean
4 company and others. That objection is not being pursued in
5 light of, among other things, the Court's ruling at the
6 confirmation hearing. There were several joinders that were
7 filed that fall away when the objection falls away.

8 In addition, several of the joinder parties
9 themselves have communicated that they had no intention of
10 pursuing them.

11 THE COURT: Okay. All right. Are there any
12 (indiscernible) objections to the fee applications?

13 Okay. That was my understanding at this point.

14 In looking at the order, I guess I have a couple
15 of questions, or the proposed order.

16 One is I gather that the Palsinelli (ph)
17 application is not on?

18 MR. FAIL: They withdrew without prejudice. I
19 think we've rescheduled for the next hearing. I think there
20 was a question as to whether or not it fell into the interim
21 compensation order. We found out at Weil Gotshal after it
22 was withdrawn. We are working with them to put it back on
23 to the next hearing and get that resolved, Your Honor.

24 THE COURT: Okay. All right.

25 And then --

1 MR. FAIL: That was an ordinary course
2 professional that --

3 THE COURT: Yes. You were concerned they were
4 over the cap and therefore they had filed an application.

5 MR. FAIL: There was no objection to that
6 application.

7 THE COURT: But it's not on for today?

8 MR. FAIL: It's not on for today.

9 THE COURT: Okay.

10 The second question I have is does this order
11 reflect any reductions off of the applications that had been
12 filed?

13 MR. FAIL: We verified these amounts with the
14 professionals. I believe, if you are asking with respect to
15 the fee examiner, Your Honor, or no?

16 THE COURT: No. Just whether -- it's often the
17 case that before I have a hearing on a fee application there
18 are discussions among the parties, sometimes with the U.S.
19 Trustee and the applicants announce certain changes to the
20 applications. I just want to --

21 MR. FAIL: Each -- and so --

22 THE COURT: -- confirm whether that --

23 MR. FAIL: There is no reduction for Weil. I can
24 speak for myself, Your Honor. The numbers --

25 THE COURT: Okay.

1 MR. FAIL: -- have been vetted with each of the
2 professionals. So to the extent that there are reductions I
3 will let anyone speak for themselves.

4 I would also add, though, that there's language in
5 here at the request of the fee examiner with consent of all
6 the parties that nothing precludes a further objection at
7 the final stage while we continue to work productively with
8 the fee examiner, you know, due to the volume. But --

9 THE COURT: Okay.

10 MR. FAIL: -- I believe others might want to
11 speak.

12 MR. DUBLIN: Good morning, Your Honor. Phil
13 Dublin, Akin Gump on behalf of the committee.

14 Certain of the committee's professionals,
15 including Akin Gump, took voluntary reductions prior to
16 filing the applications.

17 THE COURT: That's fine.

18 MR. DUBLIN: And --

19 THE COURT: I don't -- clearly I have the
20 application. I just want to know if there's any development
21 since the applications.

22 MR. DUBLIN: I would say the only development is
23 that all of the retained professionals have received initial
24 reports from the fee examiner and have begun discussions
25 with the fee examiner as we move forward in the fee process

1 generally.

2 THE COURT: Okay. All right.

3 All right. And then my last question is obviously
4 this is embodying the confirmation order already. There are
5 I think a total of 12 million of fees that are dealt with
6 one way or another in the aggregate of professionals through
7 the confirmation order that are not in the carve out
8 account.

9 The 3 million that was agreed to with various
10 administrative expense parties, and then the 9 million that
11 I believed I needed to have pulled out so that I could be
12 assured of sufficient record for confirming the plan on
13 feasibility grounds.

14 This doesn't effect that at all, this proposed
15 order, correct?

16 MR. FAIL: Your Honor, it's consistent with that.
17 So this order grants the applications, permits the payment
18 of the holdback with respect to these professionals. The
19 resolution, Your Honor, referred to included the additional
20 \$9 million that was released from the carve out to address,
21 you know, and avoid the need for any holdback. And the
22 confirmation order provided for, you know, in the
23 contingency in the event that there's not enough later for
24 an allocation, a pro rata allocation.

25 So this order, we believe, is consistent with your

1 prior ruling.

2 THE COURT: Okay. All right. Well, it certainly
3 doesn't alter it.

4 MR. FAIL: It certainly doesn't alter it.

5 THE COURT: All right. So I -- does anyone have
6 anything further to say on these applications?

7 I have the request by the U.S. Trustee to appear
8 by phone, which states that the U.S. Trustee does not object
9 to these interim applications.

10 But does anyone else wish to say anything?

11 Okay. I am obviously mindful of the fact that
12 there is a fee examiner in this case as sought by the U.S.
13 Trustee, and that he has reserved his rights generally. And
14 based on my review of the applications, the lack of
15 objection and that reservation of rights, I am going to
16 grant the applications in the amounts sought obviously on an
17 interim basis.

18 I do want to note, and this may be part of the
19 ongoing review, a couple of issues.

20 First, there is a fair amount charged by certain
21 professionals for preparation of fee applications. And I'm
22 careful to say that I'm not concerned about review of
23 others' fee applications, which is a perfectly appropriate
24 process and can be time consuming.

25 But there's a fair amount of case law in this

1 district about what should be put in to preparing the fee
2 application and the numbers are pretty high for some
3 professionals on that score.

4 Secondly, there are certain applications that were
5 hard for me to determine what was really done because of
6 vagueness in listing the work done. Largely that was by
7 parties who may not normally do bankruptcy work, including
8 the real estate consultants, Staut Risius, as well as some
9 work done by Evercore.

10 And I'm assuming that if there are questions about
11 those, the examiner will bring them up and hopefully the
12 parties will be able to satisfy him that the work that was
13 -- to describe the work that was done and that it was
14 reasonable under the circumstances with more detail.

15 And then lastly the committee has a substantial
16 expense item for a property appraiser. I don't really know
17 much about that. I mean, that appraiser was not separately
18 retained or was it separately retained?

19 MR. DUBLIN: For the record, Phil Dublin. It was
20 not separately retained. We discussed the issue with the
21 Office of the United States Trustee beforehand --

22 THE COURT: Right.

23 MR. DUBLIN: -- in order to avoid the costs
24 associated with the application.

25 THE COURT: Okay. So I just wanted to highlight

1 the issue. Again, it's -- again, we have a fee examiner
2 here. We have an active U.S. Trustee. It may not be an
3 issue. I just wanted to make sure someone had focused on
4 it.

5 MR. DUBLIN: Understood.

6 THE COURT: Okay. Okay. Let me just make sure I
7 don't have any other points to raise.

8 (Pause)

9 THE COURT: I want to be clear. I'm not reducing
10 the fees based on these points. I just think that I wanted
11 to -- I just wanted to highlight the issues so that in the
12 unlikely event that they're not being discussed they will
13 be.

14 So I'll grant the applications in the amounts
15 sought.

16 MR. FAIL: Thank you, Your Honor, appreciate that
17 and for the guidance going forward.

18 THE COURT: Okay.

19 MR. FAIL: That takes us to the next items on the
20 agenda, which are listed as the contested matters by Brian
21 Coke Ng. There's a motion for relief from the automatic
22 stay of an adversary proceeding. The debtors have filed an
23 objection to the release from the stay and a motion to
24 dismiss. My colleagues, Olga Peshko and Jennifer Crozier
25 are here today to answer any questions the Court may have.

1 THE COURT: Okay.

2 MR. FAIL: I believe Mr. Ng requested to
3 participate by phone. And unless Your Honor has questions I
4 can turn it over to you or to --

5 THE COURT: Okay.

6 MR. FAIL: -- Mr. Ng.

7 THE COURT: But before we move to those matters,
8 anyone who is on the phone or here in person just on the fee
9 applications should feel free to leave or to hang up if
10 you're on the call.

11 UNIDENTIFIED SPEAKER: Thank you.

12 THE COURT: Okay. So as far as the matters
13 involving Mr. Ng, and that's spelled N-G for the court
14 reporter's purposes, Mr. Ng, you are on the phone?

15 MR. NG: Yes, Your Honor. Good morning.

16 THE COURT: Okay. Good --

17 MR. NG: Good morning, Your Honor.

18 THE COURT: Good morning. So we have a number of
19 matters on the calendar related to Mr. Ng. There is a lift
20 stay motion to lift the stay to permit Mr. Ng to pursue
21 workers' compensation board litigation. There is a --
22 actually two, there are two motions to dismiss the complaint
23 that Mr. Ng has brought against two of the debtors as well
24 as PDX Inc. and National Health Information Network, which
25 I'll refer to as National Health.

1 And related to that adversary proceeding and the
2 motions to dismiss, Mr. Ng has brought a motion for a
3 default judgment, for entry of default and then for a
4 default judgment against the debtors who are defendants in
5 that adversary proceeding as well as motions to strike the
6 affidavit of service and an affidavit attaching the
7 transcript of a prior hearing.

8 Why don't we deal with the lift stay motion first
9 which is your motion, again, Mr. Ng, to lift the stay to
10 proceed with workers' compensation board litigation.

11 MR. NG: Yes, Your Honor.

12 So you want me to begin first or --

13 THE COURT: Yes. Well, I have reviewed the
14 pleadings on this, including the filing that you filed on
15 the 22nd in support of your motion to lift the stay and in
16 response to the debtors' objection to it.

17 So you can assume that I've read those pleadings.
18 I did -- maybe I can start by asking you a couple of
19 questions, Mr. Ng.

20 MR. NG: Yes, Your Honor.

21 THE COURT: First, this workers' compensation
22 proceeding, workers' compensation board proceeding is --
23 there's no pending proceeding, correct? You want to start
24 one?

25 MR. NG: There is no -- well, I have a case there

1 which is currently closed, but I have attempted to reopen
2 because of changes in my medical conditions. And I think I
3 have a responsibility to do that.

4 But based upon the -- my reply papers that I have
5 submitted -- filed with the Court, I respectfully request
6 that the Court accept my argument as it is and make a
7 decision based on it because currently I am on several
8 medications and I don't know how well I could do today. But
9 I respectfully ask the Court given the arguments, written
10 argument that I have submitted to accept my argument as in
11 my moving papers as they -- as well as in the reply papers.

12 THE COURT: Okay. Well, I will do that. But I do
13 want to make sure I have a correct understanding of a couple
14 of facts from you.

15 First --

16 MR. NG: Yes, Your Honor.

17 THE COURT: -- there is a -- is there a pending
18 matter before the workers' compensation board involving you?

19 MR. NG: Not yet because I am waiting for
20 permission from the Court to give me the opportunity to file
21 those papers.

22 THE COURT: So can -- I'm sorry. Can I interrupt
23 you? So have you made a claim for reimbursement of your
24 medication expenses from 2010 from the workers' compensation
25 board or from a former employer?

1 MR. NG: Well, with respect to the reimbursement
2 claims that I'm seeking, and that is one of the reasons why
3 I am -- I had wished to file a subpoena to get the records
4 so that I can have the information because the records that
5 I was receiving before prior to the subpoena was
6 insufficient. It didn't provide the details --

7 THE COURT: No. I understand. I understand that.
8 I'm asking a more limited question which is --

9 MR. NG: Okay.

10 THE COURT: -- you are -- ultimately you want to
11 recover money that you believe you should be reimbursed or
12 paid from your employer or from the workers' compensation
13 board for certain medicine, right, from 2010?

14 MR. NG: Yes. And that's what -- yes. And those
15 -- there is no time limit as to when I should submit a claim
16 --

17 THE COURT: Okay. And so that amount --

18 MR. NG: -- (indiscernible).

19 THE COURT: -- so that hasn't been turned -- that
20 claim has not been turned down yet, but you believe you have
21 that claim and you want to be able to submit it correctly,
22 right?

23 MR. NG: No. I did submit -- I've been receiving
24 some documents in November 6th. I did submit a claim to the
25 workers' compensation. I didn't hear from them again. But

1 that is -- they have, I believe, 45 days from the date they
2 receive the claim to pay it. And they did not pay it. So
3 --

4 THE COURT: And what was the amount of that claim?

5 MR. NG: For medical expense that -- prescriptions
6 that I had filled at the pharmacy back in 2010.

7 THE COURT: Right. But --

8 MR. NG: And so they -- I'm not seeking from the
9 debtors any money to pay for that. What I'm seeking is my
10 records, treatment records that will address according to
11 the workers' compensation law --

12 THE COURT: Okay.

13 MR. NG: -- (indiscernible) --

14 THE COURT: Can --

15 MR. NG: -- schedule.

16 THE COURT: Right. But what was the amount of the
17 claim that you have asserted you should be paid? Was it --
18 it's \$93, right, and 73 cents?

19 MR. NG: Yes. Yes. I (indiscernible) those money
20 (indiscernible) based on the fact I have not worked for so
21 long and I am -- I'm having a hardship. And so I need those
22 reimbursement money. Those are something that I make so
23 much effort to get the medical records and to submit the
24 information.

25 THE COURT: All right. Okay. So, Mr. Ng, the

1 board and your former employer have not rejected that claim;
2 is that right? That claim is still pending?

3 MR. NG: Well, it's -- I don't know that. I
4 haven't heard from anybody.

5 THE COURT: You haven't heard from them?

6 MR. NG: No.

7 THE COURT: Okay.

8 MR. NG: I haven't heard from them, but those
9 expenses -- what is in conflict is that -- and this conflict
10 only came back in November 6th when I received those
11 documents that it's not consistent with the purchase that I
12 had made for the prescription back in 2010.

13 THE COURT: Okay.

14 MR. NG: There is a conflict surrounding those
15 records. And so not only that, they (indiscernible) I had
16 not complied with my subpoena. That's the essence of my
17 actual complaint, why I brought them to court.

18 THE COURT: All right. But the amount at issue is
19 not \$93.63?

20 MR. NG: Somewhere about that, something like that
21 for reimbursement.

22 THE COURT: Okay. All right. Okay. So I have
23 read the pleadings and I'm happy to -- I think I've had
24 clarification on the factual issues that I wanted to have
25 clarification on.

1 I'm happy to hear from the debtors, too, although
2 the pleadings laid out their issues quite clearly.

3 MS. PESHKO: Your Honor, we're happy to rest on
4 our pleadings.

5 THE COURT: All right. So I have a ruling on this
6 issue, but I also have a suggestion. And it would relate
7 also to the complaint that was filed that is taking up a
8 great deal of the parties' time and energy on both sides.

9 First, as to the ruling, a workers' compensation
10 board action by its terms is a matter dealing with workers'
11 compensation claims; that is, claims by an employee
12 originally against his employer or her employer, but
13 ultimately through the workers' compensation front and the
14 workers' compensation board mechanism for dealing with those
15 claims, to the extent that they're not properly paid by the
16 employer.

17 As I understand it, Mr. Ng was never an employee
18 of these debtors. Rather, his relationship with the debtors
19 is through one of the debtors' K-Mart Corp.'s filling a
20 prescription or more than one prescription for him. And it
21 is the reimbursement in connection with that prescription
22 that is the subject of the workers' compensation claim. But
23 that claim itself would not be against the debtors. It
24 would be against his former employer and/or the workers'
25 compensation fund.

1 So joining the debtors in that workers'
2 compensation matter would not lead to any result against the
3 debtors. It wouldn't resolve any claims that Mr. Ng might
4 have against the debtors, and it would, therefore, not be a
5 efficient way to resolve the claims to the extent that they
6 relate to this bankruptcy case. The debtor is at most a
7 third party to that action if, in fact, there ever is an
8 issue as to whether the information that Mr. Ng has provided
9 to the workers' compensation board is somehow deficient in
10 providing for a basis for the board to award his claim which
11 is for \$93.63.

12 So, therefore, under the case law in the Second
13 Circuit that governs requests like this for relief from the
14 automatic stay to pursue non-bankruptcy litigation, namely
15 In re: Sonnax, 907 F.2d. 1280 (2nd Circuit 1990), I don't
16 believe that Mr. Ng has carried his burden to show cause
17 under Section 362(d)(1) of the Bankruptcy Code to lift the
18 stay to join the debtors in that pending or to be pending or
19 to be revised proceeding. The burden is on Mr. Ng as laid
20 out in In re: Boudreaux, 126 F.3d. 43, 48 (2nd Circuit 1997)
21 to lay out the initial showing of cause.

22 As far as the Sonnax factors are concerned, the
23 debtors' representations that they don't have any insurance
24 that would cover this particular claim, I accept, not only
25 based on their representation that the policy limits have

1 been exceeded for the relevant policy years, but also that
2 this type of policy wouldn't cover a workers' compensation
3 claim.

4 Moreover, I don't -- as I said before, the
5 workers' compensation board wouldn't be able to adjudicate
6 any claims against the debtors. And, ultimately, the issue
7 is the \$93.63 which have not -- has not been rejected yet
8 and may never be rejected by the board and/or the employer.

9 So I will deny the motion to lift the stay.

10 My suggestion is that as a resolution of all of
11 these matters Mr. Ng assign his claim to the debtors and
12 they can pursue it on his behalf, or not, in return for the
13 debtors' paying him \$96.63 (sic). And then you don't have
14 to worry about this anymore, Mr. Ng.

15 Is that --

16 MR. NG: Okay.

17 THE COURT: -- is that an acceptable resolution?

18 MR. NG: That (indiscernible). For
19 (indiscernible) to the reimbursement?

20 THE COURT: To everything.

21 MR. NG: Okay. Well, that may have helped in
22 resolving, but with the other part of the issue related to
23 my medical records which I need to have (indiscernible) did
24 not comply with, I would like the Court to make a decision.

25 THE COURT: All right.

1 MR. NG: -- as to non-compliance.

2 THE COURT: We could turn to that. We can turn to
3 that. I'm just trying to be practical here, sir. I think,
4 and based on my reading of your complaint, you want those
5 medical records, they are, you know, prescription records,
6 so that you could pursue the reimbursement claim. If --

7 MR. NG: Well --

8 THE COURT: -- the reimbursement claim is paid,
9 then I don't see why you need them at that point because
10 that's the only purpose for them. They relate to the
11 prescriptions from 2010 and the asserted need for them is to
12 get reimbursed for it.

13 MR. NG: Right. And with respect to the reasons
14 of that wasn't the only reason why I need my records. I
15 need them (indiscernible), Your Honor. And those are --
16 those -- the issues that came up because of the non-
17 compliance and because of the (indiscernible) misleading
18 information that was provided to the Supreme Court, that in
19 itself has caused me damages. The subpoena was very clear
20 in terms of providing the documents.

21 In fact, those documents would be -- is needed and
22 I don't believe I should (indiscernible) I have a right and
23 am entitled to those records, not only for the purpose of
24 the records compensation, but for other personal matters.

25 THE COURT: Well, what other purpose did you need

1 them for?

2 MR. NG: Well, there is a matter that is very
3 personal in terms of submitting a review of the medical
4 information that was provided to the debtors during the
5 relationship with them. And they are not able to provide me
6 with those information that was provided to them. Those
7 were confidential records that I provided to them and it's
8 not -- they're missing. They are not part of the ones that
9 I had received.

10 In fact, the documents that I had received on
11 November 6th, 2018 never -- in fact, I wasn't expecting them
12 because they went to the court in the Supreme Court and they
13 advised the Court that all records was submit -- was
14 provided to me. So upon hearing that and giving --
15 misleading the Court that they had provided the records and
16 then later turn around and fax me those documents that you
17 see I have attached to my complaint, was disturbing.

18 THE COURT: Okay. No. I understand --

19 MR. NG: The fact that --

20 THE COURT: -- I understand that allegation. What
21 I don't understand is what purpose do you believe you need
22 those billing and prescription records for other than the
23 reimbursement request? Why else do you need them?

24 MR. NG: I need those records, Your Honor, because
25 I'm -- it's my right to have those records. And not only

1 that, to prove that in another matter which it was against
2 me that I did not provide those -- I did not submit a claim
3 back in 2010. It has turned against me in the fact that
4 it's showing that I was never submitting a claim in 2010.
5 And the records -- in fact, some of the records that I
6 received shows that the actual person who I gave the --

7 THE COURT: No. I don't want to -- I'm just -- I
8 don't -- so what other claim is it that you need the records
9 for? What is the nature of that claim?

10 MR. NG: Well, if you look on the subpoena, Your
11 Honor, if you look on the subpoena, the subpoena is very
12 specific in detail --

13 THE COURT: No. I understand. I have the
14 subpoena. I just don't understand what you need them for.
15 What would be the use that you would put the records to?

16 MR. NG: Well, Your Honor, those records is to
17 prove my case. It's to prove another case.

18 THE COURT: Okay. I guess I'm not going to get an
19 answer on this one.

20 So why don't we move to the motion to dismiss
21 then? But you can submit -- the debtors should submit an
22 order denying the lift stay motion.

23 MS. PESHKO: Thank you, Your Honor. We will.

24 THE COURT: Okay. All right.

25 As far as the motion to dismiss is concerned, I

1 think I should deal first with the Rule 55 motion for
2 default judgment since obviously if there's a default
3 judgment we wouldn't move any further here.

4 So what is the debtors' response to that motion?

5 MS. CROZIER: Thank you, Your Honor, and good
6 morning. Jennifer Crozier, Weil Gotshal & Manges for the
7 debtors.

8 Your Honor, the debtors specifically requested
9 from this Court permission to file a response to Mr. Ng's
10 adversary complaint or rather an extended deadline for a
11 response to Mr. Ng's adversary complaint. And this Court
12 granted the debtors permission to do so, and the debtors did
13 indeed file their motion to dismiss the adversary complaint
14 in a timely manner.

15 And I do have an email confirming that extended
16 deadline here. I can hand it up to the Court if necessary.

17 THE COURT: Okay. If you could show it to me.

18 (Pause)

19 THE COURT: Okay. So Mr. Ng --

20 MR. NG: Yes, Your Honor.

21 THE COURT: -- the debtors' counsel has handed me
22 an email chain which isn't referenced in your motion for a
23 default judgment. The first item in the chain is an email
24 from one of the debtors' lawyers, Ms. Peshko, to me. It's
25 copied only -- it's sent only to me.

1 MR. NG: Yes, Your Honor.

2 THE COURT: You're not copied on it. It says:

3 "The debtors would like to respectfully request an
4 extension of the debtors' deadline to respond to the summons
5 and notice of pretrial conference in an adversary proceeding
6 filed by Brian Coke Ng to this coming Monday, July 22, 2019.
7 We have reached out to Mr. Ng to request an extension over
8 email and left a voice mail on the number he lists in his
9 filings on the record, although I want to note based on the
10 recording on the answering machine we are not sure that is
11 still his number.

12 "In our past communications with Mr. Ng we
13 sometimes receive no responses or Mr. Ng responded in the
14 form of an objection filed on the bankruptcy docket. So we
15 are concerned we might not hear from him today.

16 "Given that the pretrial conference is being
17 adjourned to August 22, we believe Mr. Ng will not be
18 prejudiced by a short extension of the response deadline and
19 we respectfully request your permission to file the response
20 by Monday, July 22. Respectfully submitted."

21 I respond back that day with an email to Ms.
22 Peshko that says, "Permission granted." And then there's a
23 response saying, "Thank you."

24 So it appears to me that I did grant the debtors'
25 request for an extension of the time to answer or otherwise

1 move to the 22nd which is when the motion to dismiss was
2 filed. I appreciate that you later responded to the
3 debtors' request and gave them a shorter extension, and
4 you've attached that email to your motion. It's actually
5 just a few minutes after Ms. Peshko's email to me, but it is
6 after that email to me. And you extended voluntarily the
7 deadline to 5:00 on July 18th.

8 But it appears to me given my extension of the
9 time to respond that the answer was filed timely -- not the
10 answer, the motion to dismiss was filed timely.

11 I will also note that even if I had not granted
12 that extension and the debtors had to live with your July
13 18th 5 p.m. date, that in the exercise of my discretion I
14 was prepared to deny the motion given the factors that
15 courts consider when confronted with a motion for a default
16 judgment in the exercise of their discretion, that
17 discretion being considerable given the general desire of
18 the courts to deal with litigation on the merits as opposed
19 to on a default basis.

20 The factors that courts are to consider when
21 there's a motion for a default judgment and there has been a
22 default is the possibility of prejudice to the movant, the
23 merits of the movant's substantive claim. Related to that
24 is the sufficiency of the complaint, the sum of money at
25 stake, the possibility of a dispute concerning material

1 facts, when the default was due to excusable neglect, and
2 the strong policy favoring decisions on the merits.

3 See generally Moore's Federal Practice, 3rd
4 Edition, Volume 10, paragraph or Section 53.31[2], and the
5 cases cited therein.

6 See also Pinaud, P-I-N-A-U-D v County of Suffolk,
7 52 F.3d. 1139, 1152 (2nd Circuit 1995).

8 Here I don't believe there is prejudice. As noted
9 in the email, the matter had already been adjourned, the
10 pretrial conference, to August 22nd. We're now addressing
11 the matter on a motion to dismiss on October 23rd. There's
12 been ample time for the parties to address the motion to
13 dismiss, including in the reply that was submitted by Mr.
14 Ng.

15 And in addition to that based on my grant of an
16 extension --

17 MR. NG: Well --

18 THE COURT: -- there's clearly no excusable
19 neglect. I mean, excuse me, there is -- there's no neglect.
20 And even if there had been neglect, it would have been
21 excusable.

22 MR. NG: May I add something, Your Honor?

23 THE COURT: Okay.

24 MR. NG: All right. Your Honor, they did not --
25 even if you had granted that July 22nd, they did not comply.

1 They -- the evidence that I had provided shows that the
2 acknowledgement of service is defective based on the fact
3 that they -- their response was mailed on the 23rd at 4
4 p.m., after 4 p.m. in (indiscernible).

5 THE COURT: Well, it was --

6 MR. NG: And the affidavits of service --

7 THE COURT: Can I interrupt you?

8 MR. NG: The affidavits of service --

9 THE COURT: It was filed on the 22nd, which was
10 the date that I extended the date to answer or otherwise
11 move. So the filing date was the 22nd. And it -- you
12 haven't really addressed whether it was sent to your email.
13 You say that ECF service you've rejected and that's correct.
14 But the case management order in this case permits separate
15 email service. I don't think you've opted out of separate
16 email service generally for this case.

17 In any event, the motion to strike the affidavit
18 or certificate of service doesn't refer to your separate
19 email address and, of course, you have email address receipt
20 as evidence generally, not with regard to the motion to
21 dismiss, but in other matters including the email that's
22 attached to the motion for a default judgment.

23 MR. NG: Yes, but --

24 THE COURT: But in any event, it's not -- this is
25 not prejudicial. The complaint, as we'll get to --

1 MR. NG: Okay.

2 THE COURT: -- has serious problems with it, and I
3 still don't understand the amount at issue in terms of
4 actual damages and whether they exceed \$93.

5 So, again, if everyone would agree that the
6 damages on default were \$93.63, I might actually award that
7 so we could get over with this and you can get on with your
8 life, sir. But if you want to keep litigating this, that's
9 my ruling. You should keep litigating it. And I won't
10 grant the motion of a default.

11 MR. NG: Okay. Okay, Your Honor. With respect to
12 the default, then if the Court has decided that the
13 affidavit of service was not -- was in favor of the
14 defendants (indiscernible), I will accept, Your Honor, if
15 you -- if the Court finds that the affidavits of service
16 (indiscernible).

17 THE COURT: Well, I -- on that point, in your
18 motion to strike the certificate of service you have not
19 stated that you didn't get the email, not the ECF email, but
20 the email to your personal email address which is the
21 correct email address. It's the same address listed in the
22 email --

23 MR. NG: (Indiscernible).

24 THE COURT: -- to the debtors' counsel granting --

25 MR. NG: (Indiscernible).

1 THE COURT: Let me finish, sir. Granting the
2 extension to the 18th. You haven't stated that you didn't
3 receive that. And, secondly, I'm prepared to accept that
4 the motion to dismiss was actually sent out initially by the
5 overnight carrier a day after it was stated in the
6 certificate that it was provided to the overnight carrier.

7 So I'm happy to correct it in that way. I don't
8 believe that that extra time was at all prejudicial.

9 MR. NG: (Indiscernible) I did not have the
10 documents in time to actually respond --

11 THE COURT: Right.

12 MR. NG: -- and given that -- yeah.

13 THE COURT: That's the ultimate point is that you
14 have had the documents for a substantial amount of time.
15 And I don't think there's been prejudice from -- if there
16 was a delay, a delay of about 12 hours.

17 MR. NG: Okay.

18 THE COURT: So I'll deny that motion.

19 And then we -- just to deal with the other
20 remaining motion before the motions to dismiss, there's a
21 motion to strike the declaration that attaches the
22 transcript of an earlier hearing before the Court, Jessie
23 Mishkin's certificate or declaration that attaches the
24 transcript.

25 I don't understand why the transcript lines are

1 different, but it's just attaching a matter that's of record
2 and filed on the docket of the court.

3 So I'll just use the transcript that's filed on
4 the docket of the court.

5 MR. NG: Yeah. Okay.

6 THE COURT: Okay.

7 Okay. So why don't we turn, then, to the two
8 motions to dismiss and I'll take the debtors' motion first.

9 MS. CROZIER: Thank you, Your Honor.

10 First, Your Honor, the debtors would like to
11 convey that we are sympathetic to Mr. Ng's situation and his
12 distress, but nevertheless move to dismiss Mr. Ng's
13 adversary complaint for the two reasons set forth in our
14 papers.

15 First, it's procedurally improper. The law is
16 clear that the proper procedural mechanism for bringing a
17 claim for money damages based on prepetition conduct is a
18 timely filed proof of claim. And indeed on March 1st, 2019
19 Mr. Ng filed a proof of claim based upon the same facts and
20 legal theories asserted in his adversary complaint.

21 Second, even if the adversary complaint were not
22 procedurally improper, the complaint fails to state a claim
23 upon which relief can be granted. And beyond that, Your
24 Honor, I'm ready to address any questions you may have.
25 Otherwise the debtors can be heard on their papers alone

1 today.

2 THE COURT: Okay. All right.

3 So, Mr. Ng, on the debtors' motion to dismiss --

4 MR. NG: Yes.

5 THE COURT: -- the complaint, I have your response
6 and I've carefully reviewed the complaint.

7 I guess I want to -- I know you're representing
8 yourself pro se, so I want to explain the standard for my
9 review of the complaint in light of the motion to dismiss so
10 that you will understand where my questions for you are
11 coming from.

12 MR. NG: Yes, Your Honor.

13 THE COURT: There are two different bankruptcy
14 rules, Federal Rules of Bankruptcy Procedure, that govern
15 the debtors' motion to dismiss this complaint. The first is
16 Bankruptcy Rule 7012 which incorporates a Federal Rule of
17 Civil Procedure, Rule 12(b)(6). And Rule 12(b)(6) provides
18 for the dismissal of a complaint for failure on the
19 complaint -- in the complaint itself to state a claim.

20 And in reviewing a claim to see whether the
21 complaint does fail to state a claim against the party who
22 made the motion, the Court assesses just the legal
23 feasibility of the complaint. I don't weigh the evidence
24 that might be offered in support of the complaint, i.e.
25 whether it's good evidence or bad evidence. I just weigh

1 whether the complaint has alleged sufficient facts which I
2 need to accept as true, and draw all reasonable inferences
3 in favor of you in accepting the facts, and determine
4 whether, if based on the facts alleged in the complaint, the
5 elements of the cause of action have been pled, have been
6 set forth in the complaint.

7 There are a couple of nuances to that. If a
8 complaint's allegations of fact are clearly contradicted by
9 documents incorporated into the complaint by reference, then
10 I don't need to accept those facts because the documents
11 speak for themselves.

12 And, secondly, I am not supposed to accept as a
13 true fact a -- what is called a legal conclusion that is
14 branded a factual allegation.

15 So simply stating the elements of a cause of
16 action without laying out the facts that support that cause
17 of action, the basic facts, isn't enough to let the
18 complaint survive. You need to lay out enough facts which,
19 if accepted as true, state a plausible claim on its face.
20 That's Rule 12(b)(6).

21 Secondly, there's another rule, Rule 70 -- I'm
22 sorry -- 7009 which incorporates Federal Rule of Civil
23 Procedure 9(b), and Rule 9(b) creates a heightened pleading
24 standard whenever fraud or misrepresentation are pled.

25 So if a claim has an element in it of fraud or

1 misrepresentation, the complaint must satisfy in addition to
2 Rule 12(b)(6), it must satisfy Rule 9(b). And Rule 9(b)
3 says that in alleging fraud a party must state with
4 particularity the circumstances constituting fraud or
5 mistake.

6 Malice, intent, knowledge and other conditions of
7 a person's mind may be alleged generally. However, intent
8 or knowledge must still be pled through the events giving
9 rise to an inference of intent with reasonable specificity.
10 So there are certain claims in your complaint that allege
11 fraud or misrepresentation. And as to those claims, Rule 9
12 applies in addition to Rule 12(b)(6).

13 So with that background, when I review the
14 complaint, it seems to me, again, that you're alleging a
15 couple of different things.

16 First, you're alleging that when you originally
17 got information with regard to certain prescriptions, that
18 information as laid out in paragraph 31 of your complaint
19 and in the attachments of the complaint said certain things.

20 And, however, later when you asked for your
21 records from the debtors, you got somewhat different record
22 information which you describe also in the complaint in
23 paragraph 42 and 43, and also in the attachments. Now those
24 requests were made several years later after the
25 prescription was filled and you got the initial information.

1 I think the harm that you contend that that
2 information or that the subsequently provided information
3 showed or caused was that you believed you were not going to
4 be able to make reimbursement claims or a claim for the
5 prescription from 2010.

6 I'm not sure I see any other use for which that
7 information was to be put or as alleged in the complaint,
8 that is, or any other aspect of the information that you
9 relied upon. So I'm reviewing this as a legal matter based
10 on that conclusion I derive from looking at the complaint
11 itself.

12 In addition, you allege, although only very
13 briefly, that -- and this is alleged at paragraphs 121 and
14 122:

15 "Defendants K-Mart Pharmacy have many and several
16 data breaches in the past. The Defendants K-Mart Pharmacy
17 data breaches were the results of lax antivirus standards.
18 Defendants K-Mart Pharmacy negligent here in this case in
19 that they failed to adequately protect and safeguard the
20 plaintiff's electronic medical records."

21 And then paragraph 122 says that NHIN/PDX equally
22 and evenly negligent in connection therewith.

23 So there is that data breach allegation, although
24 there are no facts to support what is stated in that
25 paragraph. It's what I would refer to going back to my

1 discussion to you of Rule 12(b)(6) as a conclusory
2 allegation, basically just laying out the legal assertion of
3 a claim without the facts to support it.

4 So my focus really has been on the first set of
5 facts, which are alleged at length, namely that -- and you
6 say this in a couple of places, paragraph 96 and the
7 paragraph 99. In 96 it says:

8 "The plaintiff is in need of genuine, reliable and
9 accurate medical records from the Defendant pharmacy for
10 verification in support of all out of pocket medical
11 expenses and to receive his reimbursements from workers'
12 compensation insurance carrier."

13 And then paragraph 99 says:

14 "The plaintiff cannot in good faith submit a claim
15 to the workers' compensation insurance carrier and knows an
16 inconsistency, discrepancy and contradiction of the medical
17 records is located at the Defendant's pharmacy. Indeed,
18 that would be aiding and abetting the fraud."

19 So are there any paragraphs of the complaint that
20 allege facts beyond what I've just referred to that would
21 show a claim for anything else?

22 (Pause)

23 THE COURT: That's a question for you, Mr. Ng.

24 MR. NG: That is?

25 THE COURT: That's a question for you, Mr. Ng.

1 MR. NG: Oh, you were asking me -- can you repeat,
2 Your Honor? I didn't hear that one.

3 THE COURT: My question is are there any other
4 facts in the complaint alleging a claim besides the ones
5 that I've just gone through?

6 MR. NG: Not doing well, Your Honor. Not doing
7 well. I'm not doing well.

8 THE COURT: I'm sorry. I couldn't really hear
9 that. You have to speak maybe a little closer to the phone
10 receiver.

11 MR. NG: I'm not doing well currently, Your Honor.
12 I completely lost you.

13 THE COURT: Okay.

14 MR. NG: Yeah. Medically I'm not doing well.

15 THE COURT: Okay. All right. Well, do you have
16 anything further to say in opposition to the defendant -- to
17 the debtors' motion?

18 MR. NG: Well, Your Honor, you recalled with me
19 that I had subpoenaed and came in the form that I had
20 described in my reply papers as well as in my adversary
21 complaint. And I set the facts out as you had, if you can
22 recall on February 4th when you had advised that I should
23 put everything in writing because it would be perhaps better
24 understood. And so I did just that.

25 THE COURT: Okay.

1 MR. NG: And I put it in writing.

2 THE COURT: All right. So I -- but as I
3 understand, the New York State judge denied your motion to
4 hold the debtors in contempt for their response to the
5 subpoena. So it appears to me that that issue, i.e. whether
6 the subpoena response created a claim on your behalf has
7 already been decided.

8 MR. NG: Well, because the Court was mislead, Your
9 Honor, that all records was provided to me when it was not.
10 That was in September 20th of 2018. The debtors and the
11 attorneys advised the Court that all records was provided to
12 me, and the Court make a decision that you have seen that I
13 had provided to your Court what the decision had said about
14 the alteration and the (indiscernible) because that's what I
15 was making contention about.

16 And then on November 6th additional records shown
17 up in the manner that I had provided to your court. And so
18 there is a stream of deception behavior by the declarants
19 leaving me to have the consequence of the (indiscernible)
20 over, just simply over the question of my medical records.

21 In fact, originally, I was advised to provide the
22 doctors' third party administrators with additional
23 information. That was an additional reason why I want the
24 records because I was -- I got that written letter advising
25 me to provide more information that could change the

1 decision of the claim that I had made --

2 THE COURT: But --

3 MR. NG: -- for an injury.

4 THE COURT: But I'm sorry, Mr. Ng. A letter from
5 who?

6 MR. NG: A letter from the debtors --

7 THE COURT: All right.

8 MR. NG: -- third party administrators.

9 THE COURT: But this is -- I want to go back to
10 two points. First --

11 MR. NG: Yes, Your Honor.

12 THE COURT: -- if you're alleging harm because of
13 the failure to comply with a subpoena, that really shouldn't
14 be alleged here. It should be alleged in the litigation
15 where the subpoena was issued. That judge can decide
16 because he is the one that's managing the discovery in that
17 litigation. He should decide whether the subpoena has been
18 complied with or not.

19 But, again, I go back to my original question.
20 What --

21 MR. NG: Yes, Your Honor.

22 THE COURT: What did you need that information
23 for? What was the purpose of getting the documents?

24 MR. NG: There's more than one reason for the
25 records. The additional -- one additional reason is the

1 third party administrators for the debtors wrote me a letter
2 --

3 THE COURT: No. No. I -- we don't -- I'm cutting
4 through that. All right. You have asserted the claim
5 against the debtors. The debtors tried to resolve it by
6 providing you the information that you wanted. But I'm
7 going backwards. Why do you need the information? You want
8 to use it for what purpose?

9 MR. NG: To submit to the third party
10 administrators --

11 THE COURT: No. No. Not from the debtor. From
12 someone else, not as a claim against the debtor. Your
13 ultimate claim --

14 MR. NG: But --

15 THE COURT: -- is that the debtor is not providing
16 you information that you -- and therefore you can't use it
17 for some other purpose. I think the only other purpose is
18 to submit your reimbursement claim for \$93.63. Is there any
19 other purpose that you would use the information for? I
20 don't see it in the complaint, but you should tell me. Is
21 there some purpose that you would use this information for
22 other than in this bankruptcy case?

23 MR. NG: For medical review, Your Honor.

24 THE COURT: But for what purpose?

25 MR. NG: The purpose is to -- for medical review

1 because the information that was submitted to the debtors'
2 pharmacy, they are not producing it.

3 THE COURT: Who --

4 MR. NG: They are --

5 THE COURT: So you would say some doctor would
6 need to review it? Have you alleged in the complaint that a
7 doctor needs to see that information?

8 MR. NG: Well, I did supply those information in
9 my papers, Your Honor, before the Bankruptcy Court.

10 MR. FAIL: Your Honor, Garrett Fail, Weil Gotshal
11 for the record. Can I request that we go off the record for
12 a moment?

13 THE COURT: Okay.

14 *(OFF THE RECORD DISCUSSION)

15 MR. FAIL: Okay.

16 We appreciate Your Honor's suggestions --

17 THE CLERK: Wait. Should I --

18 THE COURT: No. No. Mr. Ng should be on.

19 MR. FAIL: It's for Mr. Ng.

20 THE COURT: Yeah.

21 MR. FAIL: We -- the debtors appreciate the
22 Court's recommended approach to try to resolve this
23 efficiently. We are mindful that there is another
24 outstanding motion to lift stay that was originally on file
25 that there's a proof of claim.

1 And so after consultation with counsel for the
2 creditors' committee, Mr. Ng, in an effort to resolve all
3 outstanding issues with the debtors, if the debtors were to
4 make a payment and offer a payment of \$93.63, would that
5 resolve all issues with -- between us and -- between the
6 debtors and you, and that the Court could so order a
7 settlement to that regard to end all involvement with these
8 cases?

9 MR. NG: Well, Mr. Fail, with all respect, I
10 appreciate your offer. And so I would respectfully ask also
11 to -- for the debtors or the Court to consider the stress
12 that all of this have lead me up to, and the damages.

13 THE COURT: Well, this is your way to get over the
14 stress, sir.

15 MR. NG: Yes, Your Honor. But with all the
16 medical issues that I have right now, that would not -- that
17 would not help.

18 THE COURT: Okay. All right. Well, let's go back
19 on the record, then.

20 *(ON THE RECORD)

21 THE COURT: I still -- it really does -- what was
22 the purpose of the New York litigation? Let me ask you
23 that. What were you seeking in the New York litigation?

24 MR. NG: The purpose of the New York litigation
25 was to obtain the documents, and I have two because the OGI

1 (sic) that I had submitted to the Supreme Court --

2 THE COURT: Right.

3 MR. NG: -- literally stated what my concerns
4 were, the medical records for the purpose of submitting
5 information to resolve the pending matter with the third
6 party administrators. And the attorneys who was handling
7 the case, they immediately made suggestions to try to
8 resolve it by --

9 THE COURT: And --

10 MR. NG: -- from --

11 THE COURT: And I'm sorry. What were the pending
12 matters with the third party administrators?

13 MR. NG: I'm completely off right now. I don't
14 remember the exact details right now. But --

15 THE COURT: Okay. All right.

16 MR. NG: -- it was --

17 THE COURT: So, Mr. Ng, do you have any more to
18 say on the -- in opposition to the motion to dismiss?

19 MR. NG: Well, they -- what I wanted to say, Your
20 Honor, is that they -- I'm concerned that there was not a
21 compliance with the medical records and that caused me to
22 undergo the medical conditions that I am in today. If it
23 wasn't for that non-compliance because a statement was made
24 in front of the Supreme Court and it started thereafter this
25 petition for -- from the debtors was filed. So we never

1 able to go forward with anything because all -- everything
2 had stayed.

3 And so I brought to your court for a resolution.
4 In fact, I believe given the -- where we were with that, we
5 were about -- before -- prior to the petition filed, we were
6 about to come to some reasonable resolution at the court
7 because the attorney for the debtors at that time engaged me
8 in a good faith, I believe, for resolving the matter. I
9 made an offer and they were to get back to me. Instead,
10 they later, just a few days later I'm getting words that
11 there is this stay.

12 So I believe, you know, I believe given these
13 circumstances that I had indicated before regarding the non-
14 compliance of the documents that we -- I had seeked (sic) an
15 order to provide to the third party administrators as well
16 as for getting my reimbursement. All of those are factors,
17 Your Honor. Those -- the (indiscernible) and the actions of
18 the debtors constitute my grievances. There is no other
19 grievance in my life other than this that lead me into this
20 situation. And so, in fact, I had submitted my -- a
21 certified copy of my medical records to your court to show
22 you my circumstances. I had submitted sworn medical records
23 to your court.

24 And I'm asking this court to consider the medical
25 circumstances that came out of all of this over simple

1 medical records and the misleading information that was --
2 sorry, Your Honor. I just can't take this anymore. I feel
3 I give up. I feel I'm not living anymore because this is
4 not something I should end up living for. Your Honor,
5 pardon me, but I don't feel I can move on with this.

6 THE COURT: Okay.

7 MR. NG: This is something that I would never live
8 for. I don't believe in this type of dishonesty and
9 deceptions. I really don't.

10 THE COURT: All right. So did the debtors have
11 anything to say in response?

12 MS. CROZIER: No, Your Honor. Just --

13 THE COURT: Just a minute. I think --

14 UNIDENTIFIED SPEAKER: He's on the couch.

15 THE COURT: I don't -- you know what? I will give
16 the parties an oral ruling at a -- at the next omnibus
17 hearing.

18 So, Mr. Ng, I understand that you have health
19 issues currently and it would be --

20 MR. NG: (Indiscernible).

21 THE COURT: -- inappropriate for me to consider
22 this hearing at this point. But I have the parties' papers
23 and I will give an oral ruling at the next omnibus hearing.

24 I would urge you to consider, though, sir, putting
25 this behind you. I think it would be best for you as well

1 as everyone else. Of course, it's your decision ultimately.

2 But I believe that this all stemmed over your
3 concern about being able to assert a proper reimbursement
4 claim from your employer or the workers' compensation board.
5 If you assign that claim to the debtors, I believe the
6 debtors will pay you the amount of the claim, which I
7 believe is under a hundred dollars. And I believe
8 ultimately --

9 MR. NG: Your Honor, but --

10 THE COURT: -- that that is the best way to put
11 this behind you. But I will give the parties a ruling at my
12 -- at the next omnibus hearing.

13 MS. CROZIER: Thank you, Your Honor.

14 MR. NG: Thank you, Your Honor. But --

15 THE COURT: Okay.

16 MR. FAIL: Thank you, Your Honor. That concludes
17 today's agenda.

18 THE COURT: All right. And that goes also for the
19 other motion to dismiss which I'm prepared to decide on the
20 papers.

21 MS. CURLEY: Thank you, Judge. Just for the
22 record, Julie Curley of Kirby Aisner & Curley for Defendants
23 PDX Inc. and National Health Information. Thank you.

24 THE COURT: Okay.

25 MR. FAIL: Your Honor, I think there were -- there

1 was one other thing that I just -- I agreed to put on the
2 record.

3 We filed a notice of adjournment listing all of
4 the administrative claim requests that we saw filed on the
5 docket at the time. There was one that had been adjourned
6 previously. It was Everlast World Boxing Headquarters Corp.
7 They requested that we state on the record that their motion
8 has also been adjourned pursuant to the confirmation order,
9 so.

10 THE COURT: Okay. Very well.

11 MR. FAIL: Thank you very much, Your Honor.

12 THE COURT: Thank you.

13 All right. So as far as my rulings today are
14 concerned, I would like the debtors to submit an order
15 denying the motion to dismiss and --

16 MS. CROZIER: Denying the motion --

17 THE COURT: I'm sorry.

18 MS. CROZIER: -- to default --

19 THE COURT: Denying the motion for default
20 judgment.

21 MS. CROZIER: Default judgment.

22 THE COURT: Excuse me. And granting the motion to
23 strike the certificate of service insofar as the court will
24 treat the motion to dismiss served by regular email address
25 on the 22nd and by overnight courier on the 23rd of July.

1 And as far as the motion to strike the declaration
2 with respect to the transcript, the Court would determine
3 that that motion is moot because the Court will rely on the
4 transcript that's actually on file on the docket of this
5 case.

6 MR. FAIL: Thank you very much, Your Honor. We
7 will do that.

8 THE COURT: Okay.

9 (Whereupon, these proceedings concluded at 11:40 a.m.)
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LLP for Compensation for Services Rendered and
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Auditor and Advisor from March 1, 2018 through June
30, 2019, fee \$91,365.50, expenses: \$0.00
(ECF 4826)

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Second Interim Fee Application of Deloitte
Transactions and Business Analytics LLP for
Compensation for Services Rendered and Reimbursement
of Expenses Incurred as Bankruptcy Advisor from
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\$2,177,270.75, expenses: \$100,390.95 (ECF 4827)

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First Joint Application of Paul E. Harner, as Fee

Examiner and Ballard Spahr LLP. as Counsel to the

Fee Examiner for Interim Allowance of Compensation

for Professional Services Rendered and Reimbursement

of Expenses from April 22, 2019 through June 30, 2019

(ECF 4844)

19

Second Interim Fee Application of Akin Gump Strauss

Hauer & Feld LLP as Counsel to the Official Committee

of Unsecured Creditors for Allowance of Compensation

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Second Application of Weil, Gotshal & Manges LLP, as
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period from March 1, 2019 through and including
June 30, 2019 (ECF 4860)

19

Second Interim Fee Application of Young, Conaway,
Stargatt & Taylor, LLP, as Conflicts Counsel for the
Debtors for the period from March 1, 2019 through
and including June 30, 2019 (ECF 4862)

19

First Application for Interim Professional Compensation
for Elise S. Frejka, Ombudsman Consumer, period:
12/3/2018 to 7/31/2019, fee: \$108,386.25, expenses:
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C E R T I F I C A T I O N

I, Sherri Lynn Breach, certify that the foregoing
transcript is a true and accurate record of the proceedings.

Sherri L.
Breach

Digitally signed by Sherri L.
Breach
DN: cn=Sherri L. Breach, o, ou,
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Certified Transcriber

Date: October 24, 2019

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